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No. 04-165

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,
Petitioners,

v.

DON C. KENNARD AND HARROLD E. WRIGHT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act, 31 U.S.C. § 3729, *et seq.* authorizes private "*qui tam*" actions by a relator on behalf of the United States to recover for fraud against the United States. The Act provides, however, that "[n]o court shall have jurisdiction" over a *qui tam* action that is "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing," unless the person bringing the action is an "original source of the information." 31 U.S.C. § 3730(e)(4). An "original source" is defined, in turn, as an "individual who has direct and independent knowledge of the information on which the allegations are based." The Questioned Presented is as follows:

Whether, under the False Claims Act, individuals who possess no personal, firsthand knowledge of any aspect of an alleged fraud have the requisite "direct and independent knowledge" to qualify as an "original source" under 31 U.S.C. § 3730(e)(4).

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Tenth Circuit.

The appellees below were Comstock Resources, Inc.; Comstock Oil & Gas, Inc. (for itself and as successor by merger with Black Stone Oil Co.); Willow Creek Resources, Inc.; and W.T. Carter & Brother Co. Appellants below were Don C. Kennard and Harrold E. Wright, acting as relators on behalf of the United States.

Pursuant to Rule 29.6, Petitioners state that Comstock Resources, Inc. is the parent company of Comstock Oil & Gas, Inc. Comstock Resources, Inc. has no parent company. No publicly traded company owns 10% or more of the publicly traded stock in Comstock Resources, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Comstock Resources, Inc. and Comstock Oil & Gas, Inc. (for itself and as successor by merger with Black Stone Oil Co.) (collectively "Comstock") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 363 F.3d 1039, and is reprinted in the Appendix at Pet. App. 1a-17a. The denial of the petition for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 34a-35a. The district court's opinion is reprinted in the Appendix at Pet. App. 18a-33a.

JURISDICTION

The court of appeals entered judgment on April 5, 2004. Comstock filed a timely petition for rehearing and rehearing en banc on April 16, 2004. The court of appeals denied the petitions on May 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA"). The pertinent provisions of the FCA are reproduced in the Appendix at Pet. App. 36a.

STATEMENT OF THE CASE

This Petition arises out of a *qui tam* action filed by relators Don C. Kennard and Harrold E. Wright alleging that Comstock fraudulently underpaid royalties due on oil and gas leases to an Indian Tribe. That suit was filed *after* the allegations of fraud had been disclosed publicly in a separate action against Comstock brought by the Tribe itself. Once a

fraud has been publicly disclosed in that manner, the FCA generally precludes any subsequent private action unless the would-be relators can show, among other things, that they had "direct" knowledge of the fraud.

In the decision below, the Tenth Circuit held that Kennard and Wright had the requisite "direct" knowledge even though they neither witnessed nor participated in any aspect of the allegedly fraudulent transactions, and even though they were interlopers who had no affiliation with either Comstock or the Tribe. Indeed, Kennard and Wright had gathered what little information they had only from an examination of federal government reports and other public documents. By allowing Wright and Kennard to proceed with their FCA suit, the Tenth Circuit created a direct conflict among the courts of appeals and misinterpreted the FCA to permit suits that Congress intended to foreclose. This Court should grant review to clear up the confusion and restore the balance that Congress struck in the FCA.

A. Statutory Framework

The FCA imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). Violators are liable to the United States for a "civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* § 3729(a).

To promote enforcement, Congress enacted "*qui tam*" provisions that permit a private individual, known as a relator, to "bring a civil action for a violation of [31 U.S.C. § 3729] for the person and for the United States Government

. . . in the name of the Government." *Id.* § 3730(b)(1). The relator receives a share of any government recovery. *Id.* § 3730(d). The relator's *qui tam* complaint is filed under seal and served on the government with a "written disclosure of substantially all material evidence and information" in the relator's possession. *Id.* § 3730(b)(2). The government may then either choose to intervene and take over the litigation or decline to intervene. If the government declines to intervene, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(2), (4).

As originally enacted during the Civil War era, the *qui tam* provisions authorized any private party to sue in the government's name based on the individual's knowledge of fraud against the government. Act of March 2, 1863, ch. 67, § 4, 12 Stat. 696, 698. Although the provisions were seldom used during the first decades of the FCA's existence, they were invoked with increasing frequency during the 1930s and 1940s, "when increased government spending opened up numerous opportunities" for fraud by those providing goods and services to the government. *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679 (D.C. Cir. 1997). Because the original FCA lacked effective restrictions on private enforcement, private litigants "often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations." *Id.* at 679-80. After this Court held that the FCA authorized such suits, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), Congress amended the FCA to bar private actions that were "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." Act of December 23, 1943, § 3491(c), 57 Stat. 608, 609. That amendment reduced the abuses that prompted its enactment, but it also had the consequence of restricting *qui tam* suits by private individuals who brought

fraud to the government's attention. *See, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

In 1986, Congress amended the Act again in an effort to "resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits."[1] To achieve the desired balance, Congress enacted a number of jurisdictional restrictions that foreclose *qui tam* suits in certain circumstances. *See* 31 U.S.C. § 3730(e). In § 3730(e)(4), Congress limited a relator's ability to bring a *qui tam* action once the fraud has already been made public, for example in a court filing or a newspaper article. Section 3730(e)(4) provides that "[n]o court shall have jurisdiction" over an FCA *qui tam* action that is "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing . . . or from the news media," unless the person bringing the action is an "original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" is defined, in turn, as an "individual who has direct and independent knowledge of the information on which the allegations are based." *Id.* § 3730(e)(4)(B). This Petition concerns the meaning of the term "direct and independent knowledge" in the definition of "original source."

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[1] *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (statement of co-sponsor Sen. Grassley).

B. Factual Background

Comstock owns substantial interests in nine oil and gas leases (the "Indian Leases") covering lands within the reservation of the federally recognized Alabama and Coushatta Indian Tribes of Texas (the "Tribe"). As required by applicable federal regulations, *see, e.g.*, 30 C.F.R. § 218.51, Comstock paid the royalties it owed to the Tribe on the Indian Leases directly to the United States Minerals Management Service ("MMS"), a branch of the United States Department of the Interior, which in turn forwarded the royalties to the Tribe.[2] At the time this case was filed, Comstock was paying more than $1,000,000 in royalties each month to the Tribe.

Relator Kennard is a former state senator who served as a member of the Oil and Gas Committee of the Texas Senate and taught at the LBJ School of Public Affairs in Austin. Relator Wright owned royalty interests in a tract of land in eastern Texas near, but outside of, the Tribe's reservation. Neither Kennard nor Wright is a member of or has any connection to the Tribe, and neither one worked at or had any substantial connection to Comstock, or to the MMS or any other branch of the Interior Department.

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[2] MMS is responsible for (a) collecting royalties on behalf of the Tribe; (b) performing audits of royalty payments on behalf of the Tribe; and (c) remitting the royalty payments to the Tribe. 30 C.F.R. Parts 206 (subparts B & E), 210, 215, 216, 217, & 241. MMS is required to transfer the payments it receives from lessees such as Comstock into the trust accounts held on behalf of the Tribe entitled to receive royalties. *See* 30 C.F.R. § 219.103.

1. *The Investigation.*

In late 1997, Kennard began to suspect that Comstock was underpaying certain royalties it owed to the Tribes. His initial suspicions were based not on any firsthand knowledge or observations, but instead on a public federal government document that Kennard came across while working for Wright in connection with another FCA *qui tam* suit. In particular, a 1996 Mineral Revenue Report issued by the MMS showed that no royalties on natural gas liquids ("NGLs") were being paid with respect to production on Indian lands in Texas. Believing that the absence of any NGL royalties was "suspicious," Kennard went to the offices of the Railroad Commission of Texas and examined files on wells located on the Tribe's reservation. The files indicated that Comstock operated a number of wells on the reservation. The information in the files suggested to Kennard that gas from these wells was "wet" gas, which (in his view) made the absence of NGL royalties even more suspicious. Pet. App. 37a-40a.

Kennard then reviewed publicly available files in the Texas General Lands Office ("GLO") and noticed that the word "expired" had been stamped on the file jackets of several of the Indian Leases. This reinforced Kennard's speculation that Comstock was underpaying the Tribe, because Kennard believed that, once the Indian Leases had expired, the Tribe was entitled to *all* resources extracted from the reservation rather than just to the royalties specified in the Indian Leases. Pet. App. 40a-45a. Kennard had no personal knowledge of whether those Indian Leases in fact had expired.

Kennard shared his suspicions with Wright. Wright reviewed his own private payment records and allegedly noticed that when the operator on Wright's property sold its

lease interests to Comstock, Wright's own royalty payments dropped. Pet. App. 45a. Wright "speculated" that Comstock was also underpaying "others in the area, including the Tribe." Pet. App. 2a.

2. *The Public Disclosure.*

Kennard and Wright, through their attorneys, presented the results of their investigation to the Tribe and its lawyers and invited the Tribe to join them in a *qui tam* action as co-relators. The Tribe declined the invitation.

On October, 21, 1998, Kennard and Wright sent to the United States the disclosure statement required by the FCA, 31 U.S.C. §§ 3730(b)(2), (4), along with their proposed complaint. On October 26, 1998, the Tribe filed its own lawsuit against Comstock in the United States District Court for the Eastern District of Texas alleging that Comstock had underpaid royalties to the Tribe.[3]

C. Proceedings Below

On October 27, 1998, one day after the Tribe filed its lawsuit publicly disclosing the fraud allegations against Comstock, Kennard and Wright filed their FCA *qui tam* complaint in the same court. As required by the FCA, the complaint was filed under seal to allow the United States to review the disclosure materials and decide whether to intervene and take over the litigation. After reviewing those materials, the United States declined to intervene.

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[3] That lawsuit has spawned years of litigation between Comstock and the Tribe in multiple arenas. *See, e.g., Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes*, 78 F. Supp. 2d 589, 591 (E.D. Tex. 1999), *aff'd in part, rev'd in part*, 261 F.3d 567, 569-70 (5th Cir. 2001) (describing litigation). The issues raised in that litigation are not currently before the Court.

On December 3, 1999, relators' complaint was unsealed, and, eleven months later, their case was transferred by the Judicial Panel on Multidistrict Litigation ("MDL") to the United States District Court for the District of Wyoming, where it was consolidated with other FCA litigation pending against hundreds of natural gas producers and pipeline companies involved in gas production pursuant to federal and Indian leases.

After reviewing relators' complaint, the MDL court expressed concern about the lack of concrete allegations of fraud. The court characterized the complaint as "skimpy at best," and it suggested that relators were "throwing a lot of mud on the wall ... [and] hoping some of it sticks." Supplemental Appendix to Brief of Appellees Comstock Resources, Inc. *et al.*, at 649-50 (10th Cir. filed Apr. 18, 2003). The district court then directed relators to file an amended complaint with more specific allegations.

Comstock moved to dismiss on the ground that the court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). Comstock argued that relators' complaint was "based upon a public disclosure" – *i.e.*, the Tribe's complaint that had been filed the day before relators' own initial complaint was filed – and that relators were not the "original source" of the information.

The district court granted Comstock's motion to dismiss. The court agreed that relators allegations were "substantially similar" to the allegations publicly disclosed in the Tribe's complaint, and that relators' action thus triggered the FCA's public disclosure jurisdictional bar. Pet. App. 24a-26a.

The district court then turned to the "original source" exception to that bar. Relying on relators' own affidavits describing their investigation, the district court noted that

relators "never had any intimate knowledge of the inner-working of Comstock or the related Defendants," and instead "merely provided this Court a compilation of information that is a matter of public record." Pet. App. 30a-31a. The court noted that the "Indian lease files found at the GLO are publicly accessible," and that "the MMS reports filed by Comstock are also matters of public record." *Id.* at 31a. The district court further noted that relators' own affidavits made clear that "all the information regarding the underlying fraud was derived from the works of others," and relators had "merely compiled public information and because of their education and background were able to speculate that Comstock had underpaid NGL royalties." *Id.* The district court observed that "other circuits have uniformly held that a relator cannot possess 'direct' knowledge when the information is gathered from public sources." *Id.* at 32a; *see also id.* at 32a n.4 (citing cases). Accordingly, the court held that neither relator was an "original source."

The Tenth Circuit reversed, concluding that relators were the "original source" of the information. The court acknowledged that Wright and Kennard "did not possess substantive information about the particular fraud"; that relators were not "insiders of Comstock or the Tribe"; and that relators had "relied on public records" to assemble their complaint. Pet. App. 9a. Moreover, it was undisputed that relators had no personal knowledge of Comstock's royalty payment practices under the Indian Leases, and that relators' allegations were thus based not on observation, but on "speculat[ion]." *Id.* at 2a (noting that Wright "speculated" Comstock was underpaying "others in the area, including the Tribe"). In the Tenth Circuit's view, however, this acknowledged lack of personal knowledge was not dispositive because relators had acquired the requisite "direct" knowledge through investigation of public sources.

In particular, adopting what might be called a "sweat of the brow" approach, the Tenth Circuit emphasized that "[i]t is the character of the relator's discovery and investigation that controls this inquiry." Pet. App. 10a. The court thus eschewed any "bright line" rule for determining when a relator possesses direct knowledge, and instead adopted what amounts to a totality-of-the-circumstances approach that permits a case to proceed whenever the presiding judge believes a private individual's diligence and ingenuity should be rewarded, regardless of whether the relator witnessed or participated in the fraud.

Applying that approach, the Tenth Circuit concluded that Kennard and Wright qualified as "original sources." The court relied on the fact that "none of the public documents disclosed the alleged fraud," and that "it was only through independent investigation, deduction, and effort" that relators were able to surmise that a fraud may have occurred. Pet. App. 13a-14a. In short, "[t]hrough discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source." *Id.* at 14a.[4]

REASONS FOR GRANTING THE PETITION

This case warrants review because it presents an important and frequently recurring issue under the *qui tam* provisions of the FCA as to which the circuits are in conflict.

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[4] The Tenth Circuit also rejected Comstock's argument that FCA does not authorize a relator to sue when, as here, the United States acts essentially as a pass-through for funds such that there is no actual or threatened loss to the U.S. Treasury. Pet. App. 16a-17a. Comstock is not challenging that aspect of the Tenth Circuit's decision in this Petition.

If left undisturbed, the Tenth Circuit's interpretation of the FCA's "original source" provision threatens a vast expansion of speculative private *qui tam* actions that will disrupt the careful balance Congress struck between encouraging disclosure of fraud and preventing wasteful and parasitic lawsuits.

In this case, the Tenth Circuit squarely held that the FCA does not require a *qui tam* relator to have personal knowledge of any element of the alleged fraud to possess the "direct" knowledge necessary to qualify as an "original source." Thus, even a relator who did not witness any aspect of the fraud, who had no connection whatsoever to the allegedly fraudulent activity, and who relied exclusively on public documents and speculation therefrom, may satisfy the direct knowledge requirement as long as the relator obtained his information as a result of "independent investigation, deduction, and effort." Pet. App. 14a.

That holding, although consistent with language in decisions from the Seventh Circuit and the Eleventh Circuit, conflicts with decisions of the D.C., Second, Eighth, and Ninth Circuits, all of which require a relator to possess personal, firsthand knowledge – *i.e.*, knowledge gained as a witness or participant – of at least one element of the alleged fraud. *See, e.g.*, *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he 'saw [it] with his own eyes'") (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992)) (alteration in original); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("In order to be 'direct,' the information must be first-hand knowledge."); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1999) (holding that "direct" knowledge

requires the relator to "show that he had firsthand knowledge of the alleged fraud"); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) ("*Kreindler*"). These circuits require that a putative *qui tam* plaintiff actually witness or participate in activity that constitutes at least one essential element of the alleged fraud.

In departing from the reading of "direct and independent knowledge" adopted in these circuits, the Tenth Circuit has failed to give effect to the FCA's plain text. The D.C., Second, Eighth, and Ninth Circuits have all sensibly read the term "direct" in accordance with its plain meaning to require that knowledge be "firsthand," "immediate," or "unmediated." The Tenth Circuit, by contrast, permitted knowledge that is indisputably *indirect* and based solely on speculation and inference drawn from public sources to be sufficient as long as that knowledge was obtained through independent investigation and effort.

By gutting the "direct knowledge" limitation in this manner, the Tenth Circuit has disrupted the careful balance Congress struck in the 1986 Amendments to the FCA. The original source inquiry arises only when the relevant fraud has already been disclosed publicly, usually in a court proceeding or in the news media. In that context, Congress sensibly wanted to restrict the universe of plaintiffs who could bring suit, and it chose to do so by requiring that a plaintiff have not only "independent" but also "direct" – *i.e.*, personal and firsthand – knowledge of the fraud. *See* S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 (noting that Congress sought to reward "individuals who are either close observers or otherwise involved in the fraudulent activity" for coming forward to break the "conspiracy of silence"). Congress did

not intend, however, to "create windfalls for people with secondhand knowledge of the wrongdoing." *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1045 (2004). Yet the Tenth Circuit interpretation of the original source provision does just that.

Immediate review of the Tenth Circuit's decision is a matter of pressing importance. The FCA is an actively litigated statute, with between 300 and 500 new *qui tam* actions filed each year. *See* Statistics Under the *Qui Tam* Provision of the False Claims Act Amendment of 1986 (Dep. of Justice, Sept. 30, 2002), *reprinted in* 2 John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H (2d ed. 2003-2 Supp.) ("Boese Treatise"). The meaning of the "direct knowledge" limitation arises in a significant percentage of those cases, and, as a leading treatise has pointed out, the definition of who is an original source possessing direct knowledge of an alleged fraud "has become (along with 'public disclosure') the most litigated – and confused – issue under the *qui tam* provisions." *See* Boese Treatise § 4.02[D] (2004-1 Supp.).

The Tenth Circuit's decision presents a substantial risk of forum-shopping by opportunistic relators, and it risks inconsistent decisions for the same defendants across different jurisdictions. It also vastly complicates the "original source" inquiry, replacing a bright line test that requires firsthand knowledge with an amorphous totality-of-the-circumstances analysis that looks to the "character of the relator's discovery and investigation" and seeks to determine whether relators have achieved some vague and unspecified level of "independent investigation, deduction, and effort." That outcome is particularly unwelcome in light of the fact that, in cases (such as this one) in which the United States has declined to intervene, more than 80% are ultimately

resolved with no recovery being awarded. *Id.* The Tenth Circuit's approach thus increases the volume, and complicates the disposition, of cases that typically turn out to be meritless.

This case presents an opportunity to provide clarity where it is urgently needed by giving guidance on the proper interpretation of "direct" knowledge under the FCA's "original source" exception.

A. The Tenth Circuit's Holding That "Direct" Knowledge Under The Original Source Provisions Of The FCA Need Not Be Personal, Firsthand Knowledge Conflicts With The Decisions Of Other Courts Of Appeals.

1. The law in the Tenth Circuit is that a relator need not have personal, firsthand knowledge of any element of the fraud alleged in a *qui tam* action to possess "direct" knowledge sufficient to qualify as an "original source." Instead, the Tenth Circuit held that a speculative claim based on secondhand information gathered by a relator will suffice as long as the relator demonstrates sufficient "independent investigation, deduction, and effort." By allowing a case to proceed even when relators are not witnesses or participants and thus obtain their information by means that are indisputably *indirect*, the Tenth Circuit has, for all practical purposes, excised the "direct knowledge" requirement from the statute.

The Tenth Circuit's decision in this regard was unambiguous. The court of appeals stated, for example, that "[k]nowledge of the actual fraudulent conduct is not necessary," Pet. App. at 9a, and that a requirement that relators "possess information about the particular fraud," had "no basis in Tenth Circuit precedent." *Id.* The court went so

far as to deem "irrelevant" the fact that relators were not "insiders of Comstock" and did not witness or participate in any part of the allegedly fraudulent activity. *Id.* at 13a. The court likewise gave little weight to the fact that relators relied exclusively on public records in assembling their complaint. *Id.*

The court held instead that "[i]t is the character of the relator's discovery and investigation that controls this [original source] inquiry." *Id.* at 10a. The panel elaborated that

> [t]here must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim. Relators sorted through relatively obscure public documents and, together with personal royalty records, used these documents to discover and support their claims of the alleged fraud. . . . It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud. . . . Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Id. at 13a-14a. The Tenth Circuit thus made investigation and speculation rather than observation and participation the touchstone of "direct knowledge."

In so doing, the court of appeals extended previous Tenth Circuit authority that had watered down the "direct knowledge" requirement. In *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787 (10th Cir. 2002), for example, a divided panel held that a relator who had some inside knowledge of the defendant's activities but no firsthand knowledge of the actual fraud nevertheless possessed the requisite "direct" knowledge. The relator in

Stone was a former employee of the defendant who had firsthand knowledge of allegedly defective designs for manufacturing pondcrete blocks, but was fired before witnessing any of the toxic waste leakage that the defendant fraudulently concealed to the government. As Judge Briscoe pointed out in dissent, the relator's knowledge of the fraud was thus not based on observation, but instead derived from mere speculation that the design flaw had resulted in toxic leakage and led to the subsequent cover-up. *Id.* at 816-17 (Briscoe, J., dissenting); *see also id.* (suggesting that the panel decision was contrary to *Aflatooni*, 163 F.3d 516, and *Kreindler*, 985 F.2d 1148).

2. The Tenth Circuit's expansive view of the FCA's "direct" knowledge requirement squarely conflicts with the law of the Second, Eighth, Ninth, and D.C. Circuits, all of which require an original source to have personal, firsthand knowledge of at least one essential element of the allegedly fraudulent transaction.

In the Eighth Circuit, for example, "[a] relator has direct knowledge when he sees [the facts underlying the fraud] with his own eyes." *Kinney*, 327 F.3d at 674. The Eighth Circuit's decision in *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995) vividly illustrates the wide divergence between the Eighth Circuit and Tenth Circuit on the definition of "direct." In *Barth*, a relator named Priem brought a *qui tam* action alleging that the defendant submitted payroll reports on a federal project that fraudulently mischaracterized the nature of its employees' work. Priem, a business representative of the workers' union, witnessed the employees performing certain kinds of work, obtained publicly-available reports that included classifications of the employees' work, and interviewed employees to confirm his suspicions that the employees were

not performing the reported work. *Id.* at 701-02, 703-04. In short, Priem did at least as much investigation as the relators in this case, including personal interviews of involved parties. Nevertheless, the Eighth Circuit, applying a firsthand knowledge requirement, held that "Priem did not have direct knowledge of the manner in which Ridgedale classified its employees; instead he obtained this information through intermediary sources," and thus was not an "original source." *Id.* at 703. Were this case to have been transferred to the Eighth Circuit rather than to the Tenth, *Barth* would have unquestionably dictated the opposite outcome in this case.

The law is the same in the Ninth Circuit, which has held that an original source "must show that he had firsthand knowledge of the alleged fraud." *Aflatooni*, 163 F.3d at 525; *see also United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) (relators not original source because they "derived [the knowledge] secondhand from [defendant's employee], who had firsthand knowledge of the alleged fraud as a result of his employment at [defendant]"). So, for example, in *United States v. Alcan Electrical & Engineering, Inc.*, 197 F.3d 1014 (9th Cir. 1999), the Ninth Circuit held that a relator lacked direct knowledge of a contractor's allegedly illegal prevailing wage arrangement when the relator had not received a lower wage because of the agreement, did not "participate[] in the negotiating, drafting, or implementation of the Inside Agreement," and had not alleged that he "played any role in submitting false claims to the government." *Id.* at 1021. There is little doubt, then, that Kennard and Wright, who similarly did not participate in or observe any aspect of the alleged fraud, could not proceed with their claims in the Ninth Circuit.

The Second Circuit's approach is the same. In *Kreindler*, 985 F.2d 1148, for example, the relator law firm learned of alleged misrepresentations concerning the manufacture of Black Hawk helicopters while litigating a related wrongful death action. Following settlement, the relator filed its *qui tam* suit based on that information, which had been publicly disclosed through the litigation. Despite noting that relator had conducted "collateral research and investigations," the Second Circuit held that the relator did not have "direct" knowledge because the information was derived from the defendant and its employees. *Id.* at 1159 ("UTC was clearly the source of the core information"); *accord United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (per curiam) (a relator does not have direct and independent knowledge "if a third party is 'the source of the core information' upon which the *qui tam* complaint is based") (quoting *Kreindler*, 985 F.2d at 1159)). This case is no different than *Kreindler* – in both cases, the relators' information was derived from documents that provided the core information; the fact that the documents were public in this case makes the relators' knowledge even *more* attenuated than the *Kreindler* relator's knowledge, which was derived from documents produced directly by the defendant itself.

The D.C. Circuit, too, has held that, "[i]n order to be 'direct,' the information must be first-hand knowledge," *Findley*, 105 F.3d at 690, and it has permitted *qui tam* actions premised on investigations to proceed only when the investigations have been supplemented by "personal knowledge" of the relator. *Springfield*, 14 F.3d at 656-57. *Cf. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580 (4th Cir. 2000) (citing *Devlin* and *Springfield* in holding that relator was not an original source).

3. Although the Tenth Circuit sought to minimize the differences between its approach and the majority rule in the circuits, the court's efforts merely serve to underscore the conflict. At the outset, the Tenth Circuit ignores cases such as *Barth* and *Devlin* in which relators were held not to be original sources despite "independent investigation, deduction, and effort" (Pet. App. 13a-14a) – indeed, in *Barth*, substantial investigation. The decision below cannot be squared with those cases.

The Tenth Circuit's effort to align its decision with that of the D.C. Circuit in *Springfield* is similarly unpersuasive. In *Springfield*, the D.C. Circuit held that a relator with firsthand knowledge of fraudulent billing practices to the government had "direct and independent knowledge." In that case the relator was able to deduce that an arbitrator fraudulently billed the government for work because the relator participated in the arbitration and thus knew that work had not been done on particular days. The Tenth Circuit glossed over that the relator in *Springfield* had personal, firsthand knowledge, interpreting *Springfield* to hold that mere investigation is sufficient for "direct and independent knowledge." *See* Pet. App. at 12a. Yet the D.C. Circuit in *Springfield* expressly relied upon relator's unique "personal knowledge." *See* 14 F.3d at 657 (Relator "bridged the gap by its own efforts and experience, which in this case included *personal knowledge* of the arbitration proceedings and interviews with individuals and businesses identified in the telephone records.") (emphasis added); *see also Devlin*, 84 F.3d at 362 (noting that, in *Springfield*, "the relator's own personal knowledge was essential to his conclusion that a fraud had been committed").

The Tenth Circuit's discussion of *Findley*, *Aflatooni*, and *Kreindler* is equally flawed. Despite the Tenth Circuit's

effort to pigeonhole those cases as ones in which the claims were "based solely on the action of others," Pet. App. 10a, those decisions make clear that the lack of personal, firsthand knowledge, not the lack of effort or investigation, made the difference. For example, although the Tenth Circuit sought to confine *Kreindler* as a case in which the relator merely "took someone else's labor and investigation and gave it legal meaning," Pet. App. 12a, the Second Circuit stated that the relator had conducted its own "collateral research and investigations." 985 F.2d at 1159. *Compare also* Pet. App. 14a (relators must qualify as original source because they "ferreted out the alleged fraud") *with Aflatooni*, 163 F.3d at 525 (purpose of FCA was to "ferret out fraud by encouraging persons *with firsthand knowledge* of the alleged wrongdoing to come forward") (emphasis added; internal quotation marks omitted).

The Tenth Circuit's decision allows any member of the public to be an original source, as long as that person puts in the requisite effort and investigation; other courts of appeals have unambiguously rejected that approach. *See, e.g.*, *Barth*, 44 F.3d at 703 (stating that direct knowledge requirement was intended to avoid lawsuits by "'disinterested outsiders' who 'simply stumble across an interesting court file'") (citation omitted); *Devlin*, 84 F.3d at 362 (finding relator's knowledge was not direct because "anyone could easily have done what [relator] did . . . . and it is a virtual certainty that federal investigators would have done precisely the same thing"); *cf. Kreindler*, 985 F.2d at 1158 ("[Section] 3730(e)(4) was designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator") (internal quotation marks omitted). The Tenth Circuit's approach is flatly contrary to these decisions.

4. The direct split described above reflects widespread confusion on this issue in the federal courts. For example, although the Tenth Circuit is the only court of appeals to squarely adopt a "sweat of the brow" test for "direct knowledge," the Seventh Circuit in *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), suggested in dicta that a relator could qualify as an original source based on knowledge gained *only* from public disclosures of all elements of the fraud. *Id.* at 864. Similarly, in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), the Eleventh Circuit held that a relator was an "original source" where he "acquired his knowledge of [defendant's] alleged wrongdoing through three years of his own claims processing, research, and correspondence with members of Congress and HCFA." *Id.* at 568.[5] And the Third Circuit in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), stated in dicta that "relators may also qualify if their information results from their own investigations," though it also held that a relator must possess "substantive information about the particular fraud," *id.* at 1160-61, a requirement that the Tenth Circuit explicitly rejected, *see* Pet. App. at 9a.

The same conflicting approaches are reflected in the decisions of the district courts. Thus, for example, one court, citing both the Tenth Circuit's decision here and the Seventh

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[5] Although the Eleventh Circuit thus seemed to allow a *qui tam* action to proceed on the basis of knowledge gained primarily through investigation, the relator in *Cooper* appears to have had firsthand knowledge of the alleged Medicare fraud, because he observed the fraudulent handling of his *own* benefit claims. 19 F.3d at 568.

Circuit's decision in *Farmington*, held that a relator without personal knowledge who acquired his information solely through investigation nevertheless had "direct" knowledge because the fraud alleged was "quite complex, involving various schemes acted on an international stage over portions of four decades." *United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 954 (N.D. Ill. 2004). Another court, citing *Springfield, Barth, and Alcan*, held that a relator was not an original source because "he was not a percipient witness to any of the alleged facts upon which his allegations are based." *United States ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1183 (N.D. Cal. 2000); *see also United States ex rel. Koch v. Koch Industries, Inc.*, 1995 WL 812134, at *11-12 & n.16 (N.D. Okla. 1995) (expressly rejecting the Eighth Circuit's decision in *Barth* and holding that relators were an original source when they gathered information based on "their own extensive investigation of Defendants' oil and gas purchasing practices").

It is thus clear that there is both a sharp conflict and general confusion over the scope of the "direct knowledge" limitation in the FCA's *qui tam* provisions.

B. The Tenth Circuit's Reading Of "Direct" Knowledge Is Incorrect And Overly Expansive.

The Tenth Circuit's decision also warrants review because the court's reading of the "direct knowledge" requirement cannot be squared with the text or purpose of the statute, and provides a thoroughly unworkable standard that is likely to create significant mischief in the lower courts.

1. The text of the original source provision requires that relators have knowledge of the alleged fraud that is "direct

and independent." The word "direct" means "immediate; proximate; by the shortest course." Black's Law Dictionary 413 (5th ed. 1979). Thus "direct evidence" is evidence "in form of testimony from a witness *who actually saw, heard, or touched* the subject of interrogation." *Id.* (emphasis added). Consistent with those dictionary definitions, the clear majority of circuits to have considered the issue have required an original source to have personal, "firsthand" knowledge, generally obtained by direct observation of or participation in the alleged fraud. *See, e.g.*, *Findley*, 105 F.3d at 690 ("In order to be 'direct,' the information must be first-hand knowledge."); *Aflatooni*, 163 F.3d at 525 (relator "must show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his 'own labor unmediated by anything else.'") (citation omitted); *Barth*, 44 F.3d at 703 ("A relator is said to have direct knowledge of fraud when he saw [it] with his own eyes.") (internal quotation marks omitted; alterations in original).

The Tenth Circuit's approach cannot be squared with the plain meaning of the word "direct." To the contrary, the Tenth Circuit allows a relator to proceed when his knowledge of the alleged fraud is, as here, entirely *indirect* – *i.e.*, when relators' allegations are based entirely on sorting though "public documents" and applying "independent investigation, deduction, and effort" to discover the alleged fraud. But even a thorough investigation into public documents cannot generate "direct" knowledge of an alleged fraud; such investigation simply does not allow relators to observe – to "s[ee], hear[], or touch[]"– any of the relevant information. Black's Law Dictionary at 413.

2. Nor can the Tenth Circuit's approach be squared with the purpose of the original source provision. That provision is an exception to the public disclosure jurisdictional bar

established by § 3730(e)(4)(A), and it is implicated only when, as here, the relators file their complaint *after* the relevant information has been disclosed publicly and is thus available to members of the public and to government investigators. In those circumstances, the potential for opportunistic lawsuits is at its apex, and the government's interest in encouraging additional *qui tam* suits wanes. As the D.C. Circuit noted, "[o]nce the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds. Allowing *qui tam* suits after that point may either pressure the government to prosecute cases when it has good reasons not to or reduce the government's ultimate recovery." *Findley*, 105 F.3d at 685.

The exception Congress created is thus narrow, and was enacted to encourage "individuals who are close observers or otherwise involved in the fraudulent activity" to come forward to break the "conspiracy of silence" surrounding a fraud. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. It makes sense to limit the original source exception to observers or participants who possess some firsthand knowledge of fraud, because they can provide the government assistance in investigating and prosecuting the fraud (for example, by acting as witnesses at trial) in a way that possessors of secondhand information cannot. *See, e.g.*, Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions under the False Claims Act*, 24 Pub. Contract L.J. 237, 280-81 (1995) ("Relators who possess 'direct' information are likely witnesses and because of their anticipated continued participation are entitled to a portion of the Government's recovery. Conversely, relators who possess indirect information – hearsay information – are less likely to be valuable witnesses and, therefore, their limited ability to

contribute to the Government's action merits their dismissal."). As the Eighth Circuit noted, "[t]he False Claims Act ... is not intended to create windfalls for people with secondhand information of the wrongdoing." *Kinney*, 327 F.3d at 674.

The Tenth Circuit has strayed far from this congressional intent. First, it has expanded the narrow class of potential relators who can sue after public disclosure to include *anyone* who is willing and able to conduct an "independent investigation, deduction, and effort" to uncover the fraud.

Second, the Tenth Circuit deemed "irrelevant" what Congress viewed as critical. As noted, Congress' central objective was to encourage reporting of fraud by "individuals who are close observers or otherwise involved in the fraudulent activity" – *i.e.*, classic "insiders." Yet the Tenth Circuit criticized the district court for "rel[ying] heavily on the fact that Relators were not members of the Tribe or insiders of Comstock, *a concern we deem irrelevant to the current inquiry.*" Pet. App. 13a (emphasis added). Most circuits have correctly recognized that, although an original source need not always be a classic "insider," Congress understood such an insider to be the paradigmatic "original source" and believed the direct, firsthand knowledge possessed by such an insider to be the type of information an original source should possess. *See Stinson*, 944 F.2d at 1161 ("The paradigmatic 'original source' is a whistleblowing insider."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("The paradigm *qui tam* plaintiff is the 'whistleblowing insider.'"). The Tenth Circuit's characterization of relators' lack of connection to either Comstock or the Tribe as "irrelevant," Pet. App. 13a, therefore, while consistent with the Tenth Circuit's focus on

the amount of effort expended by relators, demonstrates just how far the Tenth Circuit has strayed.

That is not to say that "independent investigation, deduction, and effort" are of no consequence under the FCA. To the contrary, *prior* to public disclosure, a relator may bring suits based on secondhand inferences, investigation into public documents, and even interviews, audits, and internal memos. *See, e.g.*, *Stinson*, 944 F.2d at 1161 ("nothing contained here would bar suit by someone who learned of the fraud from an insider, if the information had not yet been publicly disclosed"). Once the information has been disclosed publicly, however, the balance of interests changes, and the need to prevent opportunistic lawsuits requires that only knowledge that is direct – personal and firsthand – is sufficient.[6]

3. Finally, the Tenth Circuit's approach is unworkable. Interpreting "direct" to mean "firsthand" provides a clear standard to apply in making the original source determination: either the relator observed the fraud (or some part of the fraud) with his own eyes, or he did not. In contrast, the Tenth Circuit's interpretation of the "direct" knowledge requirement provides no meaningful standards for determining whether a potential relator's investigation is sufficient to yield "direct" knowledge. The Tenth Circuit's

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[6] It is possible to gain firsthand knowledge by investigation. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999), is a good illustration. In that case, the relator gathered information that a bus service was operating its bus routes in violation of its representations to the government by actually observing buses on the routes – literally, seeing the evidence with his own eyes. But that type of firsthand observation is a far cry from the review of public documents and federal reports that relators undertook here.

approach – which focuses on the "character of the relator's discovery and investigation," Pet. App. at 10a – is not predictable, workable, or even intelligible, and it will doubtlessly be litigated extensively by opportunistic would-be relators. The Tenth Circuit has essentially adopted a formless "totality of the circumstances" inquiry that allows a court to deem a *qui tam* plaintiff an "original source" whenever the court believes it would be fair and just to do so. Given the clarity of the text that Congress actually adopted, and the purposes for which Congress adopted that text, there is neither need nor license to adopt such a standardless inquiry.

C. Review Of The Tenth Circuit's Decision Is Urgently Needed.

Review by this Court to clarify the proper definition of "direct" knowledge is urgently needed. The FCA is an important and frequently litigated statute. Since 1986, the number of *qui tam* complaints filed each year has risen, from a low 33 in 1987 to the current rate of 300 to 500 new cases each year. *See* Statistics Under the *Qui Tam* Provision of the False Claims Act Amendment of 1986 (Dep't of Justice, Sept. 30, 2002), *reprinted in* 2 Boese Treatise, Appendix H (2003-2 Supp.). Between 1986 and September 30, 2002, relators filed 3,954 *qui tam* complaints. *Id.* In that period, as a leading treatise has noted, "the 'original source' rule has become (along with 'public disclosure') the most litigated – and confused – issue under the *qui tam* provisions." *See Boese Treatise* § 4.02[D] (2004-1 Supp.).

The Tenth Circuit's decision greatly exacerbates the confusion, and presents substantial risks of forum-shopping by opportunistic relators and arbitrary decisions for defendants. Indeed, the series of "fraudulent royalty" claims brought by relators such as Kennard and Wright highlight the

potential for unfairness. Many defendants had cases decided under Tenth Circuit law rather than under more favorable Eighth Circuit or Ninth Circuit law *only* because their cases were transferred to the MDL docket. The outcome of litigation should not depend on whether or not one's suit is similar to suits pending against other defendants, or on where the relator chooses to bring suit.

Moreover, the Tenth Circuit decision threatens to vastly expand the class of relators who can bring suit, transforming the FCA's whistleblower provisions into authorization for private bounty hunters to file suit based upon speculation and hearsay uncovered in public records, and turning the Tenth Circuit into a haven for *qui tam* relators able to meet that court's lax "direct knowledge" standard. This case aptly illustrates how a relator with mere speculation and no uniquely useful knowledge can become an "original source" under the Tenth Circuit standard. Relator Wright, as the court notes, "*speculated* that Comstock was underpaying him and others in the area, including the Tribe." Pet. App. at 2a (emphasis added). Relator Kennard sorted through various public documents, but his conclusions about NGL production, payments under the leases to the Tribes, and even the legal status of the leases were all speculative and inferential.[7] To bring a successful *qui tam* action, Wright

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[7] This case demonstrates the danger of allowing a relator to rely entirely on secondhand information. To cite just one example, Kennard relied on a MMS Mineral Revenue Report from 1996 and the location of a gas processing plant near the Tribe's reservation to conclude that the Tribe was not being paid sufficient NGL royalties. *See* Appendix to Opening Brief of Appellants Kennard and Wright, at 161-63 (10th Cir. filed Mar. 24, 2003). But, Kennard ignored that the gas processing plant was not built until some time in 1996, *see id.* at 270, and that the MMS Reports from

and Kennard needed additional information, in this case information possessed by employees of Comstock or members of the Tribe. As the district court noted, relators' complaint consisted of little more than "throwing a lot of mud on the wall . . . [and] hoping some of it sticks." *See supra* at 8.

The Tenth Circuit's approach is particularly troubling in light of the compelling evidence that many of these speculative lawsuits are, like the action here, meritless. Since 1986, the United States has intervened in only 718 of the more than 3200 cases in which intervention decisions have been made. *See* 2 Boese Treatise, Appendix H (2003-2 Supp.). More than 80% of the cases in which the United States declined to intervene have been dismissed with no recovery being awarded. *Id.* Thus, there are many cases filed in which a relator is pursuing claims where there is little or no actual evidence of fraud. To make matters worse, the Department of Justice must expend substantial resources to investigate each *qui tam* complaint filed to determine whether or not to intervene. *See* 31 U.S.C. § 3730 (a) and (b).

The Tenth Circuit's relaxed "original source" standard will only add to this problem. Once a relator files a *qui tam* claim without firsthand knowledge of the particular fraud, both the Department of Justice and individual defendants are forced to investigate claims even though the relator offers no valuable firsthand information to help uncover fraud. And if the relator qualifies as an "original source," he can obtain a portion off the recovery without providing any meaningful

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1997-1999 showed that NGL royalties *were* paid to the Tribe for those subsequent years, *see id.* at 337-345.

assistance to the government. The "direct . . . knowledge" requirement is designed to limit this scenario from occurring.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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